

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID HILTON)	
Claimant)	
VS.)	
)	Docket No. 1,004,313
KEY CONSTRUCTION and)	
HILTON LATH & STUCCO, INC.)	
Respondents)	
AND)	
)	
VALIANT INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund (Fund) appealed the April 23, 2003 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

In the April 23, 2003 Order, Judge Frobish ordered the Fund to pay claimant temporary total disability benefits and to pay outstanding medical bills.

The Fund contends Judge Frobish erred. The Fund argues that claimant was not an employee of Hilton Lath & Stucco, Inc., (HLS) at the time of claimant's August 20, 2001 accident. Moreover, the Fund argues that claimant had previously elected to exclude himself from coverage under the Workers Compensation Act by purchasing workers compensation insurance coverage that excluded him.

The only issues before the Board on this appeal are:

1. Was claimant an employee of HLS on the date of accident?
2. If so, did claimant exclude himself from coverage under the Workers Compensation Act?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes that the April 23, 2003 preliminary hearing Order should be affirmed.

The Fund argues that claimant “owned a one-half partnership interest with his brother in Hilton Lath & Stucco,”¹ a respondent in this claim. The Fund, citing the *Allen*² decision, contends claimant was a self-employed individual and, therefore, is excluded from being an employee under the Workers Compensation Act. Accordingly, the Fund argues that claimant does not have a compensable claim under the Act. The Board disagrees.

Although claimant was a one-half owner of HLS, the evidence establishes the company was incorporated at the time of the accident. The Fund’s assertion that claimant owned a partnership interest in HLS is not supported by the record. Consequently, the *Allen* decision, which held that a person cannot be an employee of himself, is not applicable to these facts. Conversely, claimant was an employee of the corporation at the time of the accident. Thus, the employer/employee relationship existed at the time of the accident, satisfying that requirement of the Act.

Claimant’s brother, Michael C. Hilton, testified that the company was incorporated in May 2000. According to the copy of the Dissolution by Written Consent introduced into the record, in October 2002 the corporation was dissolved. On the other hand, the record also contains a copy of the company’s application for workers compensation insurance, which appears to be dated May 16, 2000. That application, which was signed by claimant’s brother only, identifies claimant and his brother as doing business as Hilton Lath & Stucco. The application also identifies claimant and his brother as partners, who were to be excluded from coverage. The company is not shown as being incorporated in the application.

By definition, the Workers Compensation Act is applicable to injuries sustained by employees.

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

¹ Fund’s Brief at 2 (filed May 13, 2003).

² *Allen v. Mills*, 11 Kan. App. 2d 415, 724 P.2d 143 (1986).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. . . .³

Consequently, individuals who are not employees, such as partners and sole proprietors, may elect to bring themselves within the provisions of the Workers Compensation Act.⁴ And certain employees, such as those individuals owning 10 percent or more of the outstanding stock of a corporation, who do not wish coverage under the Workers Compensation Act may elect to be excluded.

Any employee of a corporate employer who owns 10% or more of the outstanding stock of such employer, may file with the director, prior to injury, a written declaration that the employee elects not to accept the provisions of the workers compensation act, and at the same time, the employee shall file a duplicate of such election with the employer. Such election shall be valid only during the employee's term of employment with such employer. Any employee so electing and thereafter desiring to change the employee's election may do so by filing a written declaration to that effect with the director and a duplicate of such election with the employer. Any contract in which an employer requires of an employee as a condition of employment that the employee elect not to come within the provisions of the workers compensation act, shall be void. Any written declarations filed pursuant to this section shall be in such form as may be required by regulation of the director.⁵

As indicated above, claimant was an employee of HLS. Accordingly, the Workers Compensation Act provides that claimant is afforded coverage under the Act unless and until he files a written declaration with the Director's office declining or refusing the Act's provisions. At this stage of the claim, the Fund has failed to prove that claimant excluded himself from the Act's provisions.

In their brief to the Board, the general contractor Key Construction and its insurance carrier Valiant Insurance Company argued that the subcontractor HLS was solvent on the date of accident and, therefore, any award of workers compensation benefits should be assessed against the latter company. But insolvency issues are not subject to review from preliminary hearing orders.⁶ Accordingly, the Board does not have jurisdiction to address that issue at this stage of the claim.

³ K.S.A. 44-501(a).

⁴ K.S.A. 44-542a.

⁵ K.S.A. 44-543(b).

⁶ See K.S.A. 44-534a.

WHEREFORE, the Board affirms the April 23, 2003 Order but sets aside the Judge's finding that claimant was in partnership with his brother at the time of the accident.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Wade A. Dorothy, Attorney for Key Construction and Valiant
Marvin R. Appling, Attorney for Fund
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director